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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~1137~~ 73

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INDIANA & MICHIGAN ELECTRIC COMPANY, and MICHIANA ELECTRICAL UTILITY WORKERS ASSOCIATION

BRIEF OF RESPONDENT, INDIANA & MICHIGAN ELECTRIC COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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CINCINNATI, OHIO

INDEX

	PAGE
STATEMENT	1
REASONS WHY THE WRIT SHOULD BE DENIED	5
CONCLUSION	21

TABLE OF CASES

American Construction Co. v. Jacksonville, Tampa & Key West Ry. Co., 148 U. S. 372, 480	7
Boyle v. United States, 259 Fed. 803, 808	15
Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474	21
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 257, 258	7
Holgren v. United States, 217 U. S. 509, 521	21
Indianapolis & St. Joseph R. Co. v. Horst, 93 U. S. 291, 301	21
International Association of Machinists v. National Labor Relations Board, 311 U. S. 72, 80	16
Kerr v. Clampitt, 95 U. S. 188	21
Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 488, 492-3	9
National Labor Relations Board v. Arma Corp., 112 Fed. (2) 153 (C. C. A. 2)	20
National Labor Relations Board v. Botany Worsted Mills, 106 Fed. (2) 263 (C. C. A. 3)	20
National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240	12
National Labor Relations Board v. Mathieson Alkali Works, 114 Fed. (2) 796 (C. C. A. 4)	20
National Labor Relations Board v. National Motor Bearing Co., 105 Fed. (2) 652 (C. C. A. 9)	20
National Labor Relations Board, Petitioner, v. Nevada Consolidated Copper Corporation, decided April 27, 1942	7

PAGE

National Labor Relations Board v. Vincennes Steel Corp., 117 F. (2) 169, 177 (C. C. A. 7) 16

Ohio Power Company v. National Labor Relations Board, 115 Fed. (2) 839 (C. C. A. 6) 20

Southern Steamship Co. v. National Labor Relations Board, decided April 7, 1942 12

OTHER AUTHORITIES CITED

39 American Jurisprudence 171, Section 164 20

39 American Jurisprudence 177, Section 171 20

39 American Jurisprudence 178, Section 173 20

46 Corpus Juris 261-267 20

Judicial Code, Section 240 7

National Labor Relations Act, Section 7 10

National Labor Relations Act, Section 8 10

National Labor Relations Act, Section 10(b) 11

National Labor Relations Act, Section 10(e) 5, 9, 21

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BRIEF OF RESPONDENT, INDIANA & MICHIGAN ELECTRIC COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

The charge (R. 30-31) upon which the National Labor Relations Board issued its complaint was made by International Brotherhood of Electrical Workers, Local B-9 (hereinafter referred to as the Brotherhood). Michael J. Boyle was its International Vice-president (R. 184), Samuel Guy its Business Manager (R. 178), John R. Marks its Assistant Business Manager (R. 188), and Earl Freeman was a member (R. 276). Chicago was the Brotherhood's headquarters (R. 179); all its officers lived there excepting Marks, who lived in Indiana (R. 183). The charge initiated

by the Brotherhood was signed, sworn to and prosecuted on behalf of the Brotherhood by Guy (R. 31).

The only accusation in the complaint upon which a finding against the respondent was made, was that respondent had dominated and interfered with the formation and administration of an independent union, Michiana Electrical Utility Workers Association (R. 135) (hereinafter referred to as Association); this association was found to be a labor organization (R. 141), and although the facts were undisputed that the Association had bargained with the respondent and had entered into a contract affecting the labor relations of respondent's employees in many important particulars, the Board never made the Association a party to the proceedings (R. 631), and it never had the opportunity to cross-examine witnesses and to answer the charges of the complaint. Association moved in the Court of Appeals for leave to intervene as a respondent and to file an intervening petition (R. 863). It participated in the argument there (R. 865 bot.), but its motion to intervene was not passed on.

There was no finding made by the Board, and there was no evidence, that the respondent in any way suggested the formation of the Association; that it suggested membership therein to any employee; that it secured any advantage from its formation; that any employee who joined or organized the Association was in any way favored or rewarded; or that any supervisory employee who joined or aided in the formation of the Association held out or represented to any fellow employee that in joining or organizing the Association, he was carrying out the wish or will of the respondent; or that the respondent knew of any of the acts of the employees in forming the Association or in any way adopted or approved of their acts; that respondent in any way discouraged membership in any competing union; that it discriminated against any one

because he failed to join the Association or joined some other union; that respondent gave any financial assistance to the Association or in any way permitted the Association the use of any of its property.

The Board based its finding wholly upon the fact that several foremen and supervisory employees assisted in the formation of the Association and were members thereof. The constitution of the Association permitted foremen and supervisory employees to be members (R. 797-809) and foremen joined the Association only after opinion was given by the attorney for the Association that they had such right under the Act (R. 531, 569, 581). The record presents a case where the foremen in joining the Association, were serving the interests of themselves and their fellow employees.

After Brotherhood officials or members Marks, Freeman and others were arrested in February 1940, and all but Marks signed confessions of serious crimes (R. 132), on February 19, 1940, and before the decision was made by the Board, respondent filed a petition to reopen the case and receiver further evidence (R. 130). This petition set out that the charge was filed by the Brotherhood; that Guy, Marks and Freeman had been witnesses in the hearing and had been called by the Board and that their testimony was received by the trial examiner and relied upon in making of findings in the Intermediate Report; that respondent had contended from the beginning the charge filed by the Brotherhood did not present a bona fide and good faith controversy with reference to labor relations of the employees or with reference to unfair labor practices committed by respondent and that the charge had no relation whatsoever to commerce between the states; that from its inception it was nothing but part of an unlawful scheme of the Brotherhood to coerce the respondent into requiring its employees, in violation of the act, to join and become

members of the Brotherhood; that to that end both before and after the hearing it and its officers and agents had committed nine different crimes in dynamiting and destroying the towers, transmission lines, substation and other property of the respondent; that there had been paid out of the treasury of the Brotherhood the sum of $2,325.00 to hire the criminals to commit these acts; that said sum could not have been taken from the treasury of the Brotherhood without the knowledge of its officers, Boyle, Guy and Marks, and that they participated therein; that confessions of some of the criminals had been made implicating them.

The Board denied this petition on the ground "that the matters recited therein have no relation to the issues in this proceeding" (R. 139).

A petition for a remand to the Board was filed in the Circuit Court of Appeals (R. 852). This petition to refer back adopted all the statements contained in the petition before the Board and averred additionally that Marks, Earl Freeman and another had been found guilty of the crime described in the petition before the Board and sentenced to the State Penitentiary of Indiana, and that others had pleaded guilty of dynamiting; that testimony had been obtained that Marks had used money from the treasury of the Brotherhood and paid it to the convicted persons for the commission of the crimes and to purchase dynamite to be used in committing the crimes; that a regional director of the Board and one of its litigation attorneys had requested respondent to settle the case and had been informed, at conferences with respondent's attorney, of the above and

> "That practically all of said acts and matters have happened since the hearing of evidence in this case; that if the case is reopened as herein prayed for respondent will be able to prove (a) that the Board's

witnesses are of such character that they are not entitled to credit and belief, and (b) that this entire matter as presented by the complaint has no relation to the salutary purposes expressed in the National Labor Relations Act." (R. 854.)

The Circuit Court of Appeals, in its opinion (R. 867), detailed the six grounds on which respondent resisted in that court, enforcement of the Board's order. It remanded the case upon the petition of respondent to direct the Board to hear further evidence. Three of respondent's grounds of opposition to enforcement remain wholly undecided by the Court of Appeals, viz.: (4) bias and prejudice of the trial examiner, (5) absence of findings of ultimate facts, (6) lack of substantial evidence to support Board's order (R. 867).

After remanding the case to the Board for the taking of additional evidence, the Circuit Court of Appeals concluded its opinion, thus:

"The other issues presented by the parties to this appeal remain undecided." (R. 876.)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The order of the Court of Appeals (R. 866) is not a final order, but discretionary, interlocutory, and one that is expressly permitted by Section 10(e) of the Act. The opinion of the Court of Appeals ends as follows (R. 876):

"Pursuant to provisions of Section 10(e) of the Act this cause is remanded to the Board with directions to hear and consider such additional evidence as may be tendered by the parties relating to the destruction of respondent's property by the International Brotherhood of Electrical Workers, Local B-9, or its agents or representatives.

"The Board is directed to make appropriate findings in the light of such evidence and to make such

evidence a part of the transcript herein and the Board is also authorized to make such modification, if any, in its present order as the additional evidence may require.

"The other issues presented by the parties to this appeal remain undecided."

This Court should not, at this time, take the case for review because: review of the discretion of the Court of Appeals would not solve a question of great general and public interest, but would decide only if the Court's discretion was abused in this particular case; and this Court if it should wish to review the case, should do so only when it has the benefit of the findings of the Board on the new evidence and also the opinion of the Court of Appeals on the record with the new evidence included and all the issues decided.

An important statement in the opinion of the Court of Appeals is, "The new evidence may throw some light on the issue of employer domination" (R. 876). It may be that the Board will decide, in the light of the new evidence, that there was no employer domination, but that the employees sensed the kind of a union they were expected by Boyle, Guy, Marks, Freeman and others to join and preferred to join one that was free from dynamiters and racketeers. The Court of Appeals said (R. 876):

"At the time of the trial, the evidence adduced on the trial of the criminal cases in the Indiana State Court involving these witnesses, was not available to respondent or to the Board. The new evidence is of such character that its consideration by the Board would probably produce a different result."

Perhaps the Board, having received the evidence to be adduced, will, nevertheless, find there was employer domination in the formation of the Association. But it ought not to make that decision without at least having the

evidence of Brotherhood dynamiting before it, so as to draw proper inferences from the testimony. In No. 774, October Term 1941, *National Labor Relations Board, Petitioner*, v. *Nevada Consolidated Copper Corporation*, decided by this Court April 27, 1942, the Board had before it the evidence of sabotage and yet decided, as this Court said it had the right to do, the employer was at fault. We do not, therefore, question the right of the Board to draw proper inferences from the testimony after it shall have received the evidence of dynamiting and complicity of the Brotherhood. What we do say is, it should have all of the testimony before it and only then draw its inferences from the testimony. In the above case, there was no evidence that either the union which filed the charge or the particular employees denied re-employment had committed any crimes or acts of violence. In our case, the proffered evidence is conclusive of their individual guilt.

While this Court has the power by certiorari to take a case for review at any time, its decisions are that before final order it will draw a case to itself only in extraordinary instances. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257, 258, and *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 380. These cases were decided before amendment in 1925 of Section 240 of the Judicial Code, but they show that the Court always had the power to take cases on certiorari before final judgment, though regarding the right as one to be exercised sparingly, and only in cases of peculiar gravity and general importance; these reasons are still true, and are particularly applicable in the present case. The petition does not present any situation why the supervising power of this Court should be used at this time in advance of final decision of the issues by the Court of Appeals. Under Section 10(e) of the Act exclusive jurisdiction is vested in that Court to require additional

evidence before it modifies the order, enforces it, or sets it aside in whole or in part.

Very little delay will result from refusal of the writ now in the event the Board or Respondent should ultimately wish to bring the case here for review. The charge is based on alleged unfair labor practices occurring in April and May, 1937. The evidence was completed December 7, 1938. The Board is responsible for the lapse of more than five years without final decision since commission of the alleged acts. The Board's order was made February 28, 1940 (R. 135). The petition for enforcement was not filed by the Board in the Court of Appeals until December 13, 1940 (R. 1)—an interval of almost ten months. Even after the decision of the Court of Appeals, the Board did not stay the mandate and file petition for rehearing within the 30 days prescribed by the Court's rules, but allowed more than 60 days to expire before filing a motion for leave to file petition for rehearing and to recall the court's mandate (R. 885).

In view of these delays by the Board, the slight postponement that will result from leaving undisturbed the discretion and direction of the Court of Appeals to take additional evidence is not of importance. There is no reason why such evidence cannot be adduced within a very short time. The Board could then make its order in the light of the new evidence, the case would be advanced for hearing in the Court of Appeals and the whole deferment should not exceed six months at the most. The remand to the Board has this additional advantage, that the Board could proceed in the light of facts as they are today, rather than on the stale record made up four and one-half years ago. The history of the interim bargaining between the Association and the respondent should be of interest to the Board. The Board concedes in its petition (p. 18), as it must:

"5. The court below did not pass upon the merits of the Board's findings and order."

If this Court denies the present petition, the important issues now undecided, will be passed on by the Court of Appeals when and if the case is brought to it again, and this Court will have a full and complete record in deciding whether the writ should be granted and, if granted, in deciding the whole case.

2. The Court of Appeals exercised its discretion wisely in ordering a remand to the Board as expressly permitted under Section 10(e) of the Act. The evidence which it ordered the Board to receive is relevant in any of three aspects: (a) to determine whether the complaining union is an organization entitled to file a charge within the proper interpretation of the Act; (b) on the issue of company domination; and (c) as affecting the credibility of the charge and of the witnesses.

(a) The question is whether a union can use the processes of the Act, including the filing of a charge and participation in a hearing following such charge, in furtherance of an unlawful conspiracy to compel recognition of such union by terrorism, in violation of the purposes of the Labor Relations Act. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492-3.

The court below, in its opinion, says the Brotherhood had 12 members out of the company's 1,000 employees (R. 874). This statement is supported by the record (R. 94). And Guy testified that he never suggested any complaint or grievance of any of the employees (R. 186).

The unlawful conspiracy was formed by the Brotherhood even before the time of making the charge by Guy. He and Marks went to South Bend and held no less than three conferences with English, respondent's Vice-president, or with him and other officers of the company (R. 180, 182, 184). Guy testified that his purpose was to obtain the

assistance of English in causing the employees to come into the Brotherhood rather than into a C. I. O. or an independent union (R. 186); thus his purpose was to cause the respondent to coerce its employees in the exercise of their rights guaranteed in Section 7 of the Act, and in violation of Section 8(1) thereof. When these attempts at coercion did not succeed, the Brotherhood filed the charge on November 12, 1938, and committed acts of violence.

Twelve days after the filing of the charge and four days before the time fixed by the Board for a hearing of the complaint based on the charge, the Brotherhood began its campaign of dynamiting and terrorism by exploding a dynamite bomb in one of the respondent's sub-stations (R. 131, 852). Before September 8, 1939, oral argument was set before the National Labor Relations Board at Washington, and was continued to November 9, 1939. For the purpose of intimidating respondent so it would not appear at the oral argument and to intimidate it against making further resistance in the case, six other crimes of destroying and dynamiting the respondent's poles, towers and transmission lines were committed at the procurement of the charging union between September 8th and October 30, 1939 (R. 131-2); this campaign of coercion by the commission of crimes against respondent and its property continued until November 23, 1939 (R. 132); high voltage lines along public highways and railroad tracks were dynamited (R. 132); the destruction of transmission lines serving the Bendix Aviation Corporation, engaged in war work for the United States Government, was attempted (R. 853).

Respondent's petitions allege that there was withdrawn from the treasury of said Brotherhood the sum of $2,350.00 or more which was paid to the criminals who committed these acts; that the officers of the Brotherhood must have known of such payment, and therefore that they participated in the crimes (R. 132, 852). The petition to remand

filed in the Court below states that Marks, Freeman and another were convicted in the Elkhart, Indiana, Circuit Court of one of the criminal acts of dynamiting respondent's property (R. 852). This judgment of conviction was affirmed by the Supreme Court of Indiana on March 17, 1942 [40 N. E. (2) 108], and their guilt has been finally and conclusively determined. The petitions to remand state facts showing the commission of all the crimes by the officers and agents of the Brotherhood. The petitions also state that respondent did not know certainly at the time of the hearing that these persons had committed and procured the commission of these crimes.

The petitions do not rely merely upon acts of violence committed by individuals who happen to be members of the Brotherhood, but present facts showing direct responsibility and culpability of the union itself; it is stated that the commission of the acts was procured by use of the union's money, paid from its treasury, and therefore that there was a participation in the crimes by the officers of the union, and by the union itself. The petitions show, indeed, that the very conception of the charge filed with the Board to confer jurisdiction upon it, was part of a conspiracy, first, to induce the respondent to commit an unlawful act, viz.: to coerce its employees into membership in the union, and second, to engage in terrorism against respondent's property and against the lives and security of the community served, so as to bend respondent's will in its favor, and to require respondent to terminate its resistance to the Board's action, and coerce its employees into the union as the price of saving its property.

Section 10(b) of the Act provides that whenever it is charged that any person has engaged in any unfair labor practice, the Board shall have power to issue and cause to be served upon such person a complaint. Article II of the Rules of the Board provides that the charge may be made

by any person or labor organization. The Court of Appeals held that the Board has no jurisdiction until a charge is filed, and that it may be filed by employees, under certain conditions, or an agency or employee representative committee in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work (R. 874). This is the definition of "labor organization" as contained in Section 2(5) of the Act. The Court in legal effect held that the Act and the Rule require that the charge must be filed by a labor organization "which exists for the purpose . . . of dealing with employers concerning grievances . . .," etc. This was a sound interpretation of the law. "Dealing with employers" imports lawful and not felonious dealing with them.

In *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, the Court said: "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force or violence in defiance of law of the land." And it was held that employees who committed or aided and abetted in the commission of felonious acts of violence did not enjoy the status of employees. In *Southern Steamship Co.* v. *National Labor Relations Board*, decided by this Court April 7, 1942, the Court denied the status of employees to seamen who mutinied and thereby wrested from its officers the control of the ship. The Solicitor General points out in the petition here that in each of these cases the courts enforced the orders in some particular, despite the asserted misconduct of the union. But the misconduct was that of individual members; in neither did it appear, as here, that the very inceptions of the charge was part of a criminal conspiracy created by the union itself and in neither case was the question presented.

Chief Justice Hughes said in the first case:

> "The true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion."

The Brotherhood, in this instance, was not a "labor organization" within the meaning of the Act or the Board's rules. A so-called union, which destroys the employer's property, jeopardizes the lives of people of a community and sabotages the efforts of the government to secure its self-defense, as part of an unlawful scheme to cause an employer to coerce its employees to become members of it, can no more be accepted as a "labor organization" under any provision of the Act, than can a person who seizes his employer's factory be regarded as an "employee." Such a union does not exist for the purpose of promoting the purposes of the Act. It is shutting one's eyes not to recognize that the act of filing the charge was part of an unlawful conspiracy to compel recognition of itself as a bargaining agent, and to destroy the protection to self-organization secured to employees by the Act. The Trial Examiner, informed during the hearing, of the coercive and criminal acts which had occurred by then, merely said: "Your company (meaning the respondent) will be required some time to recognize B-9 and you might as well do it now" (R. 853). His bias, amounting to disqualification, remains undecided.

(b) But, even if this were not so, the Court of Appeals gave as one of its reasons for ordering a remand that, "The new evidence may throw some light on employer domination" (R. 876). And so it would.

Boyle and Guy were principal officers of the Brotherhood. The amended charge, on which the complaint was

issued, was filed by Samuel Guy, Business Manager of the Brotherhood, and sworn to by him (R. 31). Guy appeared for the Brotherhood in the hearing and was allowed to participate therein (R. 171). The Intermediate Report of the Examiner finds (R. 54 top) that the Union appeared by its business manager and participated fully in the hearing. In support of the charge of unfair labor practices, the Examiner cites the testimony of "Samuel Guy, the Union's business manager" and of "the Union's business manager Mr. Guy and his assistant, John R. Marks" (R. 56-7).

The petition of the company before the Board to reopen the case to receive further evidence (R. 130, par. 2) refers to Michael J. Boyle, of Chicago, Illinois, International Vice-President; Guy, Business Manager; and Marks, Assistant Business Manager, and alleges that Guy, Marks and Earl Freeman were witnesses who were called by the Board, whose testimony was received by the Trial Examiner and relied upon and accepted by him in making his findings and Intermediate Report. The Board's petition here (page 17) erroneously states it is not claimed Guy engaged in any criminal conduct. On the contrary, it was asserted (R. 133, 852-3) and will be contended that Guy, who filed the charge and conducted the hearing before the Board on behalf of the Brotherhood, gave the money used for the dynamiting from the treasury of the Brotherhood and must have known for what Marks and others used it. The conviction of these various witnesses and Marks, Assistant Manager, with the evidence likely to show complicity of other officers of the union, would be a confirmation of the fears and suspicions which the employees very properly had in their minds and which was the moving cause of their forming their own union rather than allying themselves with persons that they had good reason to suppose used unlawful measures. The evidence which the

Court below ordered the Board to receive will also show continuation of a course of unlawful conduct and ground for reasonable anticipation of the employees that the Brotherhood was not an organization with which they desired to associate themselves.

In the normal course of procedure this case would have been filed for enforcement in the Seventh Circuit where substantially all the acts complained of were done and where the company did by far the most of its business and where the hearings were held. But it was filed in the Sixth Circuit—perhaps in view of the Seventh Circuit having expressed itself so strongly regarding Boyle. In sustaining his sentence for a year's imprisonment plus a fine of $5,000 for violation of federal laws, that court, in *Boyle v. United States*, 259 Fed. 803, 808, after reviewing some of the evidence of Boyle's having made builders pay him sums of money under threat of a strike or boycott, said

> "Plaintiffs in error contend that this evidence was not only inadmissible, but highly prejudicial to their cause. That such testimony, if erroneously admitted, was prejudicial, must be conceded.
>
> "For it requires no stretch of the imagination to conceive of a jury taking a prejudice against a party who is thus pictured in the role of a blackmailer, a highwayman, a betrayer of labor, and a leech on commerce. But the test of admissibility does not turn upon its effect upon the jury, but on its relevancy to the issues made by the charges set forth in the indictment."

When Guy testified regarding a conference with English and Calvert, at which Marks and he were present and also Mr. Hays, an examiner of the Labor Board, he at first omitted mentioning that Michael J. Boyle, International Vice-president, was also present (R. 184-5). It is a fair inference that the employees were just as fearful of the Boyle repute as the Board was.

In *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80, it was said the employer may be held to have assisted in the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior* where employees would have just cause to believe that the solicitors professedly for a labor organization were acting on behalf of the management. So, conversely, what the employees may reasonably have had in their minds regarding the union's seeking to compel them to join was proper to be considered. *National Labor Relations Board* v. *Vincennes Steel Corp.*, 117 F. (2d) 169, 177 (C. C. A. 7). Chicago and South Bend are not far apart and self-respecting employees in South Bend knew perfectly well the methods employed by Boyle and his associates in Chicago and elsewhere. The acts of dynamiting, the confessions and convictions were confirmation of their fears and proof that these felonious acts were not ancient history, but amounted to a settled course of conduct of the union which they were being importuned by Boyle and others to join.

The first act of dynamiting was just five days before the time of hearing before the Trial Examiner. It necessarily had an effect upon the employees called to testify as to the organization of the Association. They knew that their own personal safety was involved: if the complaining union would not hesitate to dynamite company property, it would not hesitate to commit violence upon those who might not testify according to its wishes. It is not difficult to conceive an atmosphere of fear in which the hearing was conducted. The Board should have considered the evidence in the light of such a situation, but it dismissed the proffered testimony curtly by saying (R. 139) it had no relation to the issues. That condition of terrorism no longer exists

and after remand now the employees may be able to relate without restraint why they formed the Association.

(c) The evidence should have been received as to the credibility of the witnesses and it must be noted that the proffer is made to extend this evidence to Guy who filed the charge and prosecuted the complaint before the Board on behalf of the Brotherhood. Marks was active throughout the hearing and was not merely a witness. It is inconceivable that Marks could have withdrawn these sums from the union treasury for dynamiting without Guy having had knowledge of it. So, it is not merely a question of credibility of certain witnesses but the credibility of the whole charge and all of the witnesses who were marshaled by Guy and Marks.

There were only two findings of an unfair labor practice against the respondent: (1) that respondent dominated and interfered with the formation and administration of the Association (R. 165), and (2) that two supervisory employees "whose activities are attributable to the respondent" were guilty of spying upon a meeting of the Brotherhood (R. 142-3). Whether these employees were guilty of spying and whether their acts were attributable to the respondent was an important issue, the determination of which largely influenced the making of the finding as to domination.

(1) As stated in the Court's opinion (R. 876), the Trial Examiner accepted as true and apparently the Board also, the testimony of both Guy and Marks that they called upon Thomas F. English, Vice-president and General Manager, and Charles B. Calvert, Assistant Secretary, with respect to organizing the employees, and that English stated, "that he thought his employees were well paid, satisfied, and without any need of a labor organization" (R. 57); they were the only witnesses who testified to these facts.

Both English and Calvert testified that they never directly or indirectly advised or urged the employees to refrain from becoming members of the Brotherhood (R. 610, 624). This testimony of Guy and Marks was accepted by the Trial Examiner as showing opposition by respondent to the organization of its employees in the Brotherhood [R. 57(6)], and whether or not the Board made a specific finding thereon, it must be presumed to have influenced the Board's conclusions. In the entire record there is no other evidence indicating any opposition or hostility of respondent's officers against the organization of the employees in any particular union. The evidence sought to be taken relates to a most material issue, and is not cumulative.

(2) Espionage. Guy testified that he invited Livelsberger and Carlton into the meeting (R. 181) where they could hear what was said; that Carlton replied, "he would get that information anyway." The Board's petition here mistakenly states (p. 17, note 11) that this was corroborated by the evidence of the two supervisors. Livelsberger testified that he went to the meeting because of a general invitation, that he saw only seven or eight employees there and that he did not care to associate in a membership with those he saw there, that he did not talk with Guy (R. 480-1). Carlton testified that Guy wanted him to come to the meeting, he denied that he told Guy "he would get the information anyhow" (R. 578). The petition also states that this evidence was corroborated by two other witnesses, and it refers to the evidence of Frank Claeys (R. 350). Claeys testified to no fact except that he saw Livelsberger and Carlton in an automobile at the place of the meeting. The testimony of R. L. Hoblitzel also is referred to. He testified he saw Livelsberger drive by, and after parking his car came back to Carlton's car where they talked

generalities, that Guy came over and cordially invited Carlton to the meeting, and that Carlton replied that he would get the information in the morning (R. 278). Thus independent of Guy's testimony there was only one witness, Hoblitzel, who testified as to this conversation and he was disputed by Carlton.

Thus, if there is evidence that respondent was guilty of espionage, such evidence is exceedingly tenuous, and not substantial.

There was a general invitation to all employees to attend the meeting of the Brotherhood in April, 1937 (R. 481, 576). Foremen were eligible to membership in the Brotherhood. Livelsberger and Carlton, two foremen, drove to the place of meeting but did not go in. Guy invited them into the meeting (R. 181, 188, 278, 481, 578); Livelsberger testified that he went because he was invited and not to spy on any one and that because he did not see any one there with whom he had been associated for years, he did not go in (R. 480, 484). Carlton said he went out for his own benefit (R. 578). The meeting was attended by only twelve employees (R. 261-2); there is no evidence that Livelsberger or Carlton made any report of the meeting to the respondent, nor that respondent was in any way responsible for their presence, or that it knew either before or after the meeting that they were there, or that it took any action towards any employee because of his attendance; no evidence that any employee left the meeting or refrained from attending, or was in any way influenced, because of the presence or action of these two supervisory employees. There is no contention there was any labor trouble or complaint, or that respondent had in the slightest degree interested itself in the organization activities of any of its employees, at or before the time of this meeting.

In many cases with similar facts it was held the Board had failed to prove the unfair labor practice of espionage.

National Labor Relations Board v. *Mathieson Alkali Works*, 114 Fed. (2) 796 (C. C. A. 4);
Ohio Power Company v. *National Labor Relations Board*, 115 Fed. (2) 839 (C. C. A. 6);
National Labor Relations Board v. *National Motor Bearing Co.*, 105 Fed. (2) 652 (C. C. A. 9);
National Labor Relations Board v. *Arma Corp.*, 112 Fed. (2) 153 (C. C. A. 2);
National Labor Relations Board v. *Botany Worsted Mills*, 106 Fed. (2) 263 (C. C. A. 3).

Upon this material matter the evidence of Guy was important, if not controlling, and certainly no Court or Board could, if the offered evidence was received, accept Guy's testimony as credible in any respect. And even if it were considered as cumulative, that would not be decisive against the action of the court in the exercise of its sound discretion in ordering a remand for the purpose of receiving it. If newly discovered cumulative evidence is sufficient to make it probable that a different finding will be rendered, or to make clear that which was doubtful, then it should be received, and it was not an abuse of discretion to remand. 39 Am. Jur. 171, Sec. 164; p. 177, Sec. 171; p. 178, Sec. 173; and 46 C. J. pp. 261-267. The Court of Appeals held that there is a probability that there would be a different finding if the new evidence is received, as follows (R. 876):

> "The new evidence is of such character that its consideration by the Board would probably produce a different result."

Also the evidence sought to be taken is upon one of the main issues of the cause. To render evidence subject to objection that it is cumulative, in the legal sense, it must be cumulative, not with respect to the main issue between

the parties, but upon some collateral or subordinate fact bearing on that issue.

The question is not analogous to the rule controlling courts in passing upon motions for new trials because of newly discovered evidence. And none of the cases cited in the petition (pp. 17-18) in which the Trial Court denied the motion is in point here; for, in those cases the court of review based its ruling upon the broad discretion of the trial judge, and upon the point that it could not be said the court abused its discretion. Indeed, they are authority for this Court not granting the present petition to review an exercise of discretion expressly conferred by Section 10(e) of the Act on the Court of Appeals.

The Court having exercised its discretion as authorized in Section 10(e) should not have its action in that respect reviewed by this Court.

Holgren v. *United States*, 217 U. S. 509, 521;
Indianapolis & St. Joseph R. Co. v. *Horst*, 93 U. S. 291, 301;
Kerr v. *Clampitt*, 95 U. S. 188;
Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474.

CONCLUSION

We respectfully submit that this petition should be denied.

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